Supreme Court, U. S.
FILED
JUN 20 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

KATIE MAE ANDREWS, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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QUESTION PRESENTED

WHETHER A SCHOOL DISTRICT RULE WHICH EXCLUDES FROM EMPLOYMENT, PARENTS OF OUT-OF-WEDLOCK CHILDREN VIOLATES THE FOURTEENTH AMENDMENT IN THAT IT LACKS A RATIONAL RELATIONSHIP TO ANY LEGITIMATE INTEREST OF THE SCHOOL BOARD.*

COUNTERSTATEMENT OF THE CASE

Respondents are four black women who were denied or terminated from positions as teachers or teachers' aides in the Drew Municipal Separate School District solely on the basis of a rule

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* Were the Court to grant certiorari herein, Respondents would raise further questions under the First, Ninth, and Fourteenth Amendments in support of the judgment below: 1) whether the rule violates plaintiffs' liberty and privacy; 2) whether the rule, which can only be effectively enforced against women, constitutes unlawful discrimination on the basis of sex; 3) whether the rule, by virtue of its disparate impact on blacks, constitutes unlawful discrimination on the basis of race; 4) whether the rule invidiously singles out unwed mothers; and 5) whether the purported objective of the rule is constitutionally permissible.

invented by Petitioner, Superintendent Pettey, precluding employment of parents of out-of-wedlock children. The only victims of the rule challenged it under 42 U.S.C. §1981, 1983 et seq., Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., and the Fifth and Fourteenth Amendments to the Constitution.

Extensive evidentiary hearings on the origin, scope, purpose and impact of the rule were held by the District Court. Petitioners' statement of the case is an attempt to reargue before this Court the findings made by the District Court and adopted by the Fifth Circuit, to wit:

1. "There is no doubt that the policy is solely attributable to Pettey, there was no evidence that he sought either the prior advice or consent of the Board." (A5)

2) The rule was motivated by Pettey's conviction that the bearing of an out-of-wedlock child is "prima facie evidence of a lack of morality" and that "the circumstances under which an illegitimate birth occurred is (conclusively not) at all relevant to the issue of good character or bad character." (A9, fn. 7)

3) "[T]he superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease." (A11, A30)

4) The rule was intended to apply not only to instructional personnel, but to secretaries, librarians, cafeteria operators, nurses, social workers, school principals, school volunteers and even P.T.A. presidents. Pettey was

uncertain whether the rule should include bus-drivers, janitors or maids. (A5, fn. 2)

5) There was no evidence beyond "defendants' suggestions, quite implausible in our view" that a person's status as an unwed parent would be known, deemed praiseworthy and emulated by the students, (A13,33); and there was no evidence, "other than speculation and assertions of opinion," that "the presence of unwed parents in a scholastic environment contributes to school girl pregnancies." (A13)

In sum, the unanimous findings of the lower courts based upon the testimony of Respondent Pettey, belie Petitioners' contention that the rule is not premised on a conclusion about the moral character of a parent of an out-of-wed-

lock child. Moreover, it is clear that, after careful consideration of the testimony and credibility of defense experts who attempt to establish the after-the-fact rationale for the rule set forth in paragraph 5 above, the District Court rejected their testimony as being "of a judgmental nature unsupported by any studies that provide a sound, factual basis for their conclusions." (A24) The Circuit shared the District Court's view that the testimony concerning role-modeling by Petitioners' so-called expert, Dr. Ernest van den Haag, upon whom Petitioners rely so heavily herein, (Pet. pp. 5-7) was "speculative," if not "quite implausible." (A13, 33)

These findings irrevocably led the lower courts to the conclusion that the rule "created an irrational classification." (A 7, 25).

REASONS FOR NOT GRANTING THE WRIT

I.

THE LOWER COURTS' TESTING OF THE RULE AGAINST FOURTEENTH AMENDMENT STANDARDS IS CONSISTENT WITH THE SETTLED PRECEDENTS OF THIS COURT.

Petitioners' first claim that "the district court lacked jurisdiction to consider these claims for employment" (Petition, p. 8), is patently absurd. It ignores and distorts the settled precedent of this Court which holds that a person may not be excluded by the state from a profession or occupation in a manner or for reasons that contravene due process or equal protection.

There is no conflict, as Petitioner contends, between the decisions below and this Court's rulings in Board of Regents v. Roth, 408 U.S. 564, and Perry

v. Sinderman, 408 U.S. 593.The threshold question in every case is "whether the (nature of) the interest (at stake) is within the Fourteenth Amendment's protection of liberty and property," not whether the interest can be characterized as a "right" as opposed to a "privilege." Board of Regents v. Roth, supra, 408 U.S. at 571. This Court reaffirmed in Roth that Fourteenth Amendment liberty is at stake at a minimum "where a person's good name, reputation, honor or integrity" is at stake. Wisconsin v. Constantineau, 400 U.S. 433, 437; Wieman v. Updegraff, 344 U.S. 183, 191; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123; United States v. Lovett, 328 U.S. 303, 316-317; Peters v. Hobby, 349 U.S. 331, 352 (Douglas, J. concurring); where the state's refusal of em-

ployment "impose[s] . . . a stigma or other disability that foreclose[s] . . . freedom to take advantage of other employment opportunities", see Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S. at 185 (Jackson, J., concurring); Truax v. Raich, 239 U.S. 33, 41; and where eligibility regulations fail "to have a rational connection with the applicant's fitness or capacity. . ." Schware v. Board of Bar Examiners, 353 U.S. 232, 239; Slochower v. Board of Higher Education of New York, 350 U.S. 551, 555. See also, Willner v. Committee on Character, 373 U.S. 96, 103; Cafeteria Workers v. McElroy, 367 U.S. 886 at 894, 898; Board of Regents v. Roth, supra, 408 U.S. at 573-574.

Respondents were denied teaching positions on the basis of their being

identified as mothers of children born out-of-wedlock and, thereby, branded as immoral and as a baneful influence on the children they would teach. See Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (N.D. Miss. 1969). Clearly, the concept of liberty, as enunciated in Board of Regents v. Roth, supra, and the cases cited therein, encompasses their complaint.*

Furthermore, both courts below implicitly recognized that the rule impinges upon rights of fundamental constitutional dimension: the right to procreate and the right to rear one's na-

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* Even where liberty or property interests subsumed by the Due Process clause, as explicated in Roth and Perry, are not at stake, the principle of Equal Protection invalidates a classification which has no rational relationship to a legitimate legislative objective. United States Department of Agriculture v. Moreno, 413 U.S. 528; Jefferson v. Hackney, 406 U.S. 535; Weber v. Aetna Casualty & Surety, 406 U.S. 164. As this is the test applied by the lower courts, see discussion infra, p.13, Petitioner's Due Process argument is irrelevant.

tural children. (A10, 30)* As such, the rule demands scrutiny under the Due Process and Equal Protection Clause of the Fourteenth Amendment consistent with the settled precedent of this Court. See, e.g., Cleveland Board of Education v. La Fleur, 414 U.S. 632, 94 S.Ct. 791; Roe v. Wade, 410 U.S. 113; Stanley v. Illinois, 405 U.S. 645; Eisenstadt v. Baird, 405 U.S. 438; Griswold v. Connecticut, 381 U.S. 479; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535; Meyer v.

* Quoting the District Court (A30), the Fifth Circuit held: "A past biological event like childbirth out of wedlock, even if relevant to the issue, may not be controlling; and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural mother is hardly determinative of the matter. Furthermore, the policy, if based on moral judgment, has inherent, if unintended, defects or shortcomings. While obviously aimed at discouraging premarital [sic] sex relations, the policy's effect is apt to encourage abortion, which itself is staunchly opposed by some on ethical and moral grounds."

Nebraska, 262 U.S. 390.* See also, Keyishian v. Board of Regents, 385 U.S. 589, 603, 605-606.

Though it was not necessary for the lower courts, and it is likewise not necessary for this Court, to treat the liberty at stake herein as "fundamental," it is clear that the rule demands and was properly accorded scrutiny under the Fourteenth Amendment.

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* Petitioners' argument that these rights abide only in the context of a state-sanctioned marriage relationship is without support in this Court's rulings. In Stanley v. Illinois, 405 U.S. 645, the Court made explicit that the rights to conceive and nurture one's children, articulated in Meyer v. Nebraska, supra, and Skinner v. Oklahoma, supra, exist independent of the marital relationship. Stanley v. Illinois, supra, 405 U.S. at 651. See also, Roe v. Wade, supra, 410 U.S. at 124, 148; Eisenstadt v. Baird, supra, 405 U.S. at 453; and Griswold v. Connecticut, supra, 381 U.S. at 497 (Goldberg, J., concurring).

II.

SINCE THE PETITION SEEKS REVIEW OF THE DISTRICT COURT'S FINDING OF FACT, CONFIRMED BY THE CIRCUIT, THAT THE RULE LACKS ANY RATIONAL RELATIONSHIP TO ITS ASSERTED OBJECTIVE, CERTIORARI IS NOT WARRANTED.

Point II of the Petition effectively seeks certiorari in order to have this Court review the basic findings of fact made by the District Court and confirmed by the Fifth Circuit, which findings underlie their conclusion that the school board's rule barring mothers of out-of-wedlock children from employment, in other than maintenance, jobs lacks any rational relationship to any legitimate state objective. (See Counter-statement of Facts, supra pp. 2-4). This Court has made clear that such factual review is not a matter meriting issuance of the writ of certiorari.

Berenyi v. Immigration Director, 385 U.S. 630, 635; Graver Mfg. Co. v. Linda Co., 336 U.S. 271, 275; United States v. Johnston, 268 U.S. 220, 227.

Though Petitioners' argument is couched in the plaint that the lower courts failed to apply the presumption of constitutionality (Pet. pp. 11-13), Petitioners ultimately concede that the question presented is whether the "rule in question serves a legitimate state interest and has a rational relationship to such interest." (Pet. p. 13). There is no question but that the lower courts applied this "traditional" rational relationship test of Equal Protection. United States Department of Agriculture v. Moreno, supra; Jefferson v. Hackney, supra; Weber v. Aetna Casualty & Surety, supra.(A7-8, 25-27)*

* footnote on next page.

In addition, the lower courts applied the settled law of this Court which invalidates, under due process, irrebutable presumptions which infringe on basic constitutional liberty where the presumed fact does not necessarily follow from the proven fact. Cleveland Board of Education v. LaFleur, supra, 94 S. Ct. at 798-800; Vlandis v. Kline, 412 U.S. 441, 452; Stanley v. Illinois, supra, 405 U.S. at 654. It follows a fortiori that a conclusive presumption which violates the traditional rational relationship test of equal protection also violates this due process standard.

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footnote from preceeding page.

* The District Court invalidated the rule on the alternative ground that, though neutral on its face, it establishes on inherently sex-based classification meriting strict scrutiny.(A33-37) This aspect of its holding is clearly distinct from the invalidation of the rule under the rational relationship test. The Circuit Court specifically found it unnecessary to reach the question of sex-discrimination. (A7, fn. 5)

The lower courts both assumed the state interest, profferred -- to further the creation of a properly moral scholastic environment -- to be a legitimate object of regulation (A8, 25). For the purposes of this Opposition, Respondents deem it unnecessary to challenge this assumption. Thus, the only question is, that framed by the Circuit -- whether the Pettey rule "advances that objective in a manner consistent with the Equal Protection Clause," Reed v. Reed, 1971 404 U.S. 71, 76. (A8). In Schware v. Board of Bar Examiners, supra, a case which dealt with the state's requirements for admission to practice law, this Court framed the test in terms apposite to the case at bar:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the

Bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

353 U.S. at 239 (emphasis added)

The Circuit described the School Board as "offer[ing] three possible rationales for the rule: 1) unwed parenthood is prima facie proof of immorality; 2) unwed parents are improper communal role models, after whom students may pattern their lives; 3) employment of an unwed parent in a scholastic environment materially contributes to the problem of schoolgirl pregnancies."(A8)* Adopting

* Before this Court, the School Board purports to make a hasty retreat from the first rationale, claiming that it is not the immorality per se, but the disapproved status of unwed motherhood that motivates the rule. This contention, belied by the record below, should be viewed suspiciously by the Court, not only because it sets up an illusive distinction, but also because the "initial primacy (of the immorality per se argument) casts a shadow over th[is] case." See Cleveland Board of Education v. La Fleur, supra, 94 S. Ct. at 797,fn9 and at 802, fn 1 (Powell, J., concurring). The expansiveness of the rule (See Counterstatement of the Case, supra, p. 4 para. 4), which far transcends the role-modeling rationale, further illustrates the primacy of the first rationale.

the findings of the District Court, the Circuit affirmed on the ground that "the policy created an irrational classification." (A7, 25).

With respect to the first rationale, that unwed parenthood is prima facie proof of immorality, the Circuit found, on the basis of Pettey's testimony, that a conclusive presumption of immorality motivated the rule. (A9, fn. 7). The Circuit quoted the District Court's analysis of the over-inclusiveness of the rule (A10-11):

> [N]o consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegitimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged women, who has

premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. (A10, 29)

* * * *

Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease. Such a presumption is not only patently absurd, it is mischievous and prejudicial requiring those who administer the policy to "investigate" the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it. (A11, 30)

Conversely, the rule fails the test of rationality in that it is also invid-

iously underinclusive. Eisenstadt v. Baird, supra, 405 U.S. at 448; Railway Express Agency v. New York, 336 U.S. 106, 112-113. Though directed at immorality based not on unwed parenthood (A20, n.3, 34) but upon the precedent non-marital sex conduct, the rule ignores those who engage in extra-marital sex (A11) and in pre-marital sex, but avoid by nature or design the conception, birth, or responsibility for rearing of the issue.(A10)* Many single women are untouched by the rule, as are virtually all men, since "[u]nless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement." (A34, 36)

The above findings, upon which the irrationality of the rule is based, are not only inappropriate subjects for this Court's review, they are also undisputed.

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* See fn. page 4, supra.

With respect to the School Board's second, after-the-fact rationale that the rule is aimed not at sexual morality, but at the status of unwed parenthood as a role model, the Circuit likewise adopted the District Court's finding that the record failed to establish a rational nexus between the status and the claimed attitudinal impact on students:

> In absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy is highly improbable, if not speculative. We are not at all persuaded by the defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family life-styles of teachers or other adults within a school system (i.e. whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them." (A13, 33)

The Circuit also found the third rationale, the encouragement of schoolgirl

pregnancies,"profferred by the [School] District in the hopes of salvaging the Pettey rule" bereft of support in the record. (A13)

In sum, testing the rule against the minimal rationality standard, the lower courts unanimously found the rule to be lacking in factual foundation. This Court would have to reverse these findings to reverse the judgment below. Such is not a matter worthy of the writ.

CONCLUSION

WHEREFORE, Respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

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